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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 22 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel contends that the petitioner has established its ability to pay the beneficiary's proffered wage. The statement on appeal indicates that a brief and/or additional evidence will be submitted to the AAO in 30 days, but the record has received no further submissions. The appeal will be decided on the record as it currently stands.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [CIS].

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is $746 per week or $38,792 per year, based on a 40-hour week. The record indicates that the petitioner was established in 1998 and is organized as a partnership.

As evidence of its ability to pay the beneficiary's proposed salary, the petitioner initially submitted a copy of its Form 1065, U.S. Partnership Return of Income covering the period between April 1, 1998 and December 31, 1998. It indicates that the petitioner declared -$330,632 as ordinary income. Schedule L of the tax return reflects that the petitioner had -$128,608 in net current assets. CIS will consider net current assets because it represents the amount of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. In the instant case, neither the petitioner's ordinary income of –$330,632, nor its net

current assets of -$128,608, were sufficient to cover the beneficiary's proffered salary of $38,792 for the period April through December 1998.

On May 21, 2002, the director requested additional evidence from the petitioner relevant to its ability to pay the beneficiary's proffered wage. The director requested the petitioner's most recent federal tax returns or annual reports accompanied by audited or reviewed financial statements, and copies of the beneficiary's Wage and Tax Statements (W-2s) for any years that the petitioner employed the beneficiary between 1998 and 2001. The petitioner responded by submitting a copy of its 2000 federal partnership tax return and a copy of the beneficiary's 2001 W-2. It showed that the petitioner paid him $25,553.75 in wages in 2001, which represents $13,238.25 less than the proposed wage offer of $38,792. The petitioner's tax return reflects that the petitioner declared ordinary income of -$156,179 in 2000. Schedule L indicates that the petitioner showed -$121,068 as net current assets.

The director denied the petition, concluding that neither the petitioner's ordinary income, nor its net current assets showed sufficient levels to pay the beneficiary's proffered wage in 1998 or 2000. The AAO concurs and would further note that the petitioner's evidence lacked financial data covering the visa priority date, January through March 1998, as well as some subsequent periods, 1999 and 2001. The director also mentioned the insufficiency of the petitioner's net current assets for 1999, but the AAO cannot locate such documentation in the file. Although the director's request for additional evidence failed to specifically mention all relevant periods since the priority date, the information provided by the petitioner sufficiently establishes that it cannot demonstrate a continuing ability to pay beginning at the visa priority date as required by 8 C.F.R. § 204.5(g)(2).

On appeal, counsel merely states that "common practice in [sic] restaurant business is to expect profits after five years." Counsel also suggests that the petitioner's gross income and existence over a period of time demonstrates an ability to pay the proffered wage. As noted above, no further argument or evidence has been submitted to the record. It is also noted that in reviewing the petitioner's ability to pay the proffered wage, CIS examines the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava,* 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh,* 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983).

As to counsel's suggestion that losses are to be expected in the restaurant business for at least five years, counsel has provided no first-hand corroboration of this statement. The assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533,534 (BIA 1988); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). The AAO cannot conclude that such a broad generalization of the nature of the petitioner's business merits an automatic waiver of an examination of its net income. Although in some cases, the principles enunciated in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) may be applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage, the AAO cannot conclude that the instant case represents such a situation. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business

locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, no unique business hardship has been demonstrated. Rather, the petitioner's evidence suggests that it has never enjoyed a framework of profitable years.

Based on the evidence contained in the record and after consideration of the arguments further presented on appeal, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered salary as of the priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.